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DECISION



21233  
Iannicelli,  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-204316

DATE: March 23, 1982

MATTER OF: Mosler Systems Division, American  
Standard Company

DIGEST:

1. Protester, a potential supplier to the proposed awardee under an IFB, is an "interested party" under section 21.1(a) of GAO Bid Protest Procedures insofar as issue raised concerns specification of IFB.
2. Protest that specification requires the use of the protester's product is denied because there was no requirement for any particular product to be used by the prime contractor.
3. So-called "Christian doctrine" does not permit incorporation of mandatory clauses which have not been included in invitation for bids. Charge that invitation was defective for failing to include mandatory "Brand Name or Equal" clause is untimely under section 21.2(b)(1) of our Bid Protest Procedures since filed after bid opening date.
4. Protest that bidder for prime contract is nonresponsible because bidder may use nonresponsible subcontractor is dismissed because GAO does not review affirmative determinations of bidder's responsibility except where fraud is alleged on part of procurement officials or definitive responsibility criteria allegedly have not been met. Neither exception to our policy is present in this case.
5. Protest that agency awarded contract prior to resolution of protest without promptly notifying protester is denied because deficiency is procedural irregularity which does not affect validity of award.

"Christian doctrine" is limited to incorporation of mandatory contract clauses into an otherwise validly awarded Government contract and does not stand for the proposition that mandatory provisions may or should be incorporated into an IFB. See MET Electrical Testing Company, B-198834, November 28, 1980, 80-2 CPD 398, and cases cited therein.

Mosler contends the Mortenson bid is nonresponsive because Mortenson failed to name the brand name product for the automatic materials distribution system requirement. Thus, according to Mosler, Mortenson must either use the "Telelift" system or its bid is nonresponsive. We do not agree. The IFB contained no requirement that a bid must contain the brand name or descriptive literature to describe a system offered as the equal to the "Telelift" system. Mortenson's bid took no exceptions to the specifications or other requirements. Since nothing on the face of Mortenson's bid limited, reduced, or modified Mortenson's obligation to furnish a system which would be acceptable to the Army as equal to the "Telelift" system and in accordance with the rather detailed specifications (totaling 10 pages) for this item, the bid was responsive. Compac-Cutting Machine Corp., B-195865, January 11, 1980, 80-1 CPD 60. Therefore, we deny the protest on this issue.

While Mosler also contends that Mortenson is nonresponsive because it may use a nonresponsive subcontractor, we point out that whether Mortenson is capable of performing as promised is a matter of responsibility. Compac-Cutting Machine Corp., supra. It is our Office policy not to review affirmative determinations of responsibility unless either fraud is alleged on the part of procurement officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. The reasons set forth by Mosler in its protest to support its charge that Mortenson is nonresponsive are derived from provisions found in section 14C of the invitation. It is our view that these provisions do not set out definitive responsibility criteria, but rather state how the work is to be accomplished and establish performance requirements as opposed to requirements which are a precondition to award. Descriptions of how the work will be accomplished

The Mosler Systems Division, American Standard Company (Mosler), has protested against award of a construction contract to the M.A. Mortenson Company (Mortenson) by the Department of the Army pursuant to invitation for bids (IFB) No. DACA84-81-B-0001. The contract calls for construction related to alterations and additions to the Tripler Army Medical Center, Honolulu, Hawaii.

Mosler's protest is focused on section 14C of the specifications, which requires the contractor to provide an automatic materials distribution system and, more specifically, on section 14C-7, which states: "MANUFACTURED PRODUCT: Automatic materials distribution system shall be the 'Telelift Automatic Materials Distribution System' or approved equal." The "Telelift" name is a registered trademark of Mosler. Mosler charges that it is the only manufacturer of the "Telelift" system and that there are no approved equals. Mosler contends that either Mortenson's bid is nonresponsive or Mortenson itself is nonresponsive because Mortenson may subcontract this portion of the work to Lamson Corporation (Lamson), which allegedly does not meet several of section 14C's requirements. Notwithstanding Mosler's characterization of its protest, we view it to be essentially one against the specifications in the IFB. Since this directly affects Mosler and the acceptability of an equal product, we conclude that Mosler is an interested party. See California Microwave, Inc., 54 Comp. Gen. 231 (1974), 74-2 CPD 181.

However, since this alleged impropriety was apparent prior to bid opening, to be timely under § 21.2(b)(1) of our Bid Protest Procedures (4 C.F.R. part 21 (1981)) it had to be protested prior to bid opening. Since it was not, it is untimely and not for consideration.

Likewise, Mosler's contention that the "Brand Name or Equal" clause mandated by Defense Acquisition Regulation (DAR) § 7-2003.10 (Defense Procurement Circular No. 76-8, June 15, 1977, should have been included in the IFB is untimely.

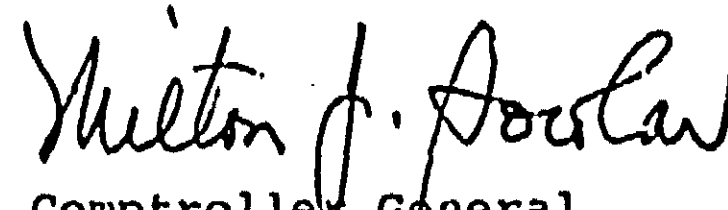
In connection with Mosler's contention that the clause should be read into the invitation under the holding of G.L. Christian & Assoc. v. United States, (160 Ct. Cl. 58, 320 F.2d 345 (1963), cert. denied, 375 U.S. 954 (1963)), we have held that the so-called

do not become definitive responsibility criteria just because they are stated in detail. Whitco Industrial Corp., B-202810, August 11, 1981, 81-2 CPD 120; Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268. Therefore, even if Mosler were an interested party for this issue, we would not review the affirmative determination of Mortenson's responsibility.

While Mosler next charges that any equipment supplied to the Army by Lamson through Mortenson will violate provisions of the Buy American Act (41 U.S.C. § 10a, et seq. (1976)), we find Mosler not to be an "interested party" to raise this matter as it does not relate to the specifications, but rather the award of the prime contract.

Finally, Mosler has objected to the fact that the Army awarded this contract to Mortenson prior to resolution of the protest by our Office without promptly notifying Mosler of its decision to proceed with award as required by section 2-407.8(b)(3) of the DAR (1976 ed.). We need only point out that a deficiency of this type is a procedural irregularity which does not affect the validity of award. Policy Research Incorporated, B-200386, March 5, 1981, 81-1 CPD 172. Therefore, we deny the protest on this point.

The protest is denied in part and dismissed in part.

for   
Comptroller General  
of the United States